Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-1076

NO.

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1985

JEAN LYONS, Guardian of The Person and Estate of Richard Raymond Whittington, a Minor,

Petitioner,

v.

DANIEL BUTE, Conservator of the Estate of Cherry Whittington, an Incompetent, and CHERRY WHITTINGTON a/k/a CHERRY WHITTINGTON PRICE,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

KENNETH A. KOZEL
PETZ AND KOZEL
Second at Joliet Street
La Salle, Illinois 61301
Telephone: (815) 223-4400
Counsel for Petitioner

Counsel of Record

The constitutionality of a statute of the State of Illinois is drawn into question in this petition for writ of certiorari and 28 U.S.C. 2403(b) may be applicable.

QUESTION PRESENTED FOR REVIEW

Whether a minor child and his legal guardian were denied due process of law and equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 2 of the Constitution of the State of Illinois when they were not given notice of and allowed to be present at a hearing on a petition to terminate the conservatorship of the Child's mother when the termination of the conservatorship vested the mother with a superior right to custody of the child as against the child's legal guardian and allowed the mother to seek custody of the child.

TABLE OF CONTENTS

	Page
Question Presented For Review	i
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Constitutional Provisions Involved..	2
Statement of the Case	2
Statement of the Facts	2
Procedural History	13
Reasons for Allowance of the Writ...	18
Argument	20
Conclusion	40
Appendix A	41
Appendix B	59
Appendix C	64
Appendix D	77
Appendix E	78
Appendix F	79
Appendix G	80
Appendix H	81

TABLE OF CONTENTS

(continued)

Page

Appendix I 82

Appendix J 84

Appendix K 86

Appendix L 86

Appendix M 87

TABLE OF AUTHORITIES

Page

Cases Cited

In Re Custody of Townsend, 86 Ill. 2d 502, 427 N.E. 2d 1231 (1981)..... 20, 21, 22

Statutory Provisions

Ill. Rev. Stat., ch. 110½, par. 1-2.11 (1980)..... 14, 33

Ill. Rev. Stat., ch. 110½, par. 11-7 (1977)..... 10, 20, 21, 22, 30, 32, 34

Ill. Rev. Stat., ch. 110½, par. 11-14(b) (1977)..... 14

Ill. Rev. Stat., ch. 110½, par. 11(a)-17(a) (1981)..... 15, 33

Ill. Rev. Stat., ch. 110½, par. 11(a)-18(a) (1981)..... 15, 31, 33

Ill. Rev. Stat., ch. 110½, par. 11(a)-20(c) (1979..... 15, 16, 17, 23

28 U.S.C. 1257..... 1, 18

28 U.S.C. 2101(c)..... 1

TABLE OF AUTHORITIES

(continued)

Supreme Court Rule 17.1(c)..... 19

Supreme Court Rule 20.4..... 1

Constitutional Provisions

Constitution of the United States, Fourteenth Amendment, Section 1. 16, 18, 23, 36, 37

Constitution of the State of Illinois, Article 1, Section 2.. 16, 18, 23, 36 37

OPINIONS BELOW

In Re Estate of Whittington, 483 N.E. 2d 210 (Ill. 1985) This opinion appears in this petition as Appendix A.

Matter of Estate of Whittington, 124 Ill. App. 3d 198, 463 N.E. 2d 1314 (3d Dist. 1984) This opinion appears in this petition as Appendix C.

JURISDICTION

28 U.S.C. 1257 provides that final judgments rendered by the highest court of a State may be reviewed by the Supreme Court of the United States by writ of certiorari where the validity of a State Statute is drawn in question on the ground of being repugnant to the Constitution of the United States.

The opinion of the Supreme Court of Illinois was dated and filed June 5, 1985. A timely petition for rehearing was denied September 27, 1985. This petition is timely filed within 90 days of that date pursuant to 28 U.S.C. 2101(c), as contemplated by Supreme Court Rule 20.4.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Ill.Rev.Stat., ch.110½,
par. 1-2.11 (1980) See Appendix F

Ill.Rev.Stat., ch.110½,
par. 11-7 (1977) See Appendix G

Ill.Rev.Stat., ch.110½,
par. 11-14(b) (1977) See Appendix H

Ill.Rev.Stat., ch.110½
par. 11(a)-17(a) (1981) See Appendix I

Ill.Rev.Stat., ch.110½,
par. 11(a)-18(a) (1981) See Appendix J

Ill.Rev.Stat., ch.110½,
par. 11(a)-20(c) (1979) See Appendix K

Constitution of the United States
Fourteenth Amendment - See Appendix L

Constitution of the State of Illinois,
Article 1, Section 2 - See Appendix M

STATEMENT OF THE CASE

1. Statement of the Facts

Jean Lyons is the legal guardian of the person and estate of Richard Raymond Whittington, a minor, and has been acting as such legal guardian for almost 8 years. She has had physical custody of the child since May 2, 1978, when the child was two

months old. The child will be 8 years old on February 26, 1986 (R. C171, 383-0552). Jean Lyons is also the child's great aunt. On May 2, 1978, the child's natural mother, Cherry Whittington, killed the child's natural father, Ralph Whittington. An autopsy report indicated that Ralph Whittington was shot 11 times with a shotgun with 9 of the shots being in the back. (R. C57, 383-0519). Cherry Whittington admitted in a criminal proceeding instituted against her that she shot Ralph Whittington without lawful justification (R. C57, 383-0519). In a deposition taken May 16, 1981, Cherry Whittington admitted that she was having an affair and that she was planning on leaving Ralph Whittington shortly before the shooting. She was found not guilty by reason of insanity of murder and manslaughter charges in a bench trial and was sent to the Zeller Mental Health Center

in Pecria, Illinois for further treatment in December of 1978 and remained there until November 1f 1979 (R. c171-2, 383-0552).

Following her release from Zeller Mental Health Center, Cherry Whittington became the housekeeper of Howard Price and began living with him at his home while his first wife was living in a nursing home. In February of 1981 she was admitted to the Community Hospital of Ottawa for mental problems. She stated to a registered nurse that she was afraid of Howard Price and that he had beaten her. While at the hospital, Cherry Whittington told Dr. Lloyd Ravlin, a treating psychiatrist, that a few weeks prior to that date she had a couple of drinks, something happened when she came home and she "flipped her lid". She described a sexual act performed by Howard Price that "made her sick to watch". She also told staff nurses at the hospital

that she was afraid that Hitler was coming to the hospital and that she had seen Hitler in her room and talked to him. She further stated to the nurses that she becomes nervous being around children. She also stated how difficult it would be to have her child. Upon the advice of her attorney she terminated treatment with the La Salle County Mental Health Center in March of 1981 and began treating with Dr. Erwin J. Roubicek, a psychiatrist (R.C172-5, 383-0552). While under treatment Cherry Whittington petitioned the court to terminate a conservatorship over her estate which had been ordered by the court following the killing of Ralph Whittington. She also petitioned the court to terminate a guardianship over the person and estate of her minor child, also established shortly after the killing of Ralph Whittington. She also asked the court to restore custody of the

minor child to her. The child's guardian was given notice of this first hearing and an opportunity to object to the termination of the conservatorship and cross-examine two psychiatrists called as witnesses by Cherry Whittington (R. C54, 383-0519). The first psychiatrist called as a witness at the hearing on February 3, 1982, was Dr. Sohee Lee, a psychiatrist who had treated Cherry Whittington at the Zeller Mental Health Center. Upon direct examination Dr. Lee stated that in his opinion Cherry Whittington was competent to manage her estate and of taking care of a minor child. Upon cross-examination Dr. Lee stated that he diagnosed Cherry Whittington to be suffering from schizophrenia which he considered to be a form of psychosis (Pages 39-40, Transcript of Proceedings, commencing February 3, 1983). In his opinion she had suffered a second psychotic episode when

she was hospitalized at Ottawa Community Hospital in February of 1981 (Pages 51-2, id.) He defined schizophrenia as a physical problem resulting from a chemical imbalance in the brain which is treated with medication (Page 54, id.). Upon further cross-examination he recommended that Cherry Whittington continue to take medication and receive counseling from a psychiatrist or psychologist (Page 56, id.). His cross-examination was concluded when he stated that Cherry Whittington could cope with stress as long as she was on medication and being counseled (Page 65, id.).

The next witness called to testify at the hearing was Dr. Erwin J. Roubicek, also a psychiatrist. On direct examination Dr. Roubicek testified that he was presently seeing Cherry Whittington on a weekly basis (Page 77, id.). He also stated that in his opinion she was competent to manage her

estate and capable of taking care of a minor child. He also offered the opinion that she would not harm herself or a minor child as long as she continued to receive the weekly treatment she was receiving from him, which consisted of psychotherapy and medication (Pages 78, 82, 97, id.). On cross-examination he stated that he also diagnosed her as schizophrenic (Page 90, id.). He concluded his cross-examination by stating his opinion that Cherry Whittington would become psychotic again if she ceased taking her medication (Page 93, id.).

Cherry Whittington then testified in her own behalf. She stated that she stopped taking medication after she left the Zeller Mental Health Center in 1979 because she thought she did not need it anymore (Page 145, id.). She also stated that she did not continue under a doctor's care after leaving the Zeller Mental Health Center (Page 145, id.). She admitted to being hospitalized in

February of 1981 after becoming depressed and upset (Page 147, id.). She stated that she now felt better taking medication (Page 148, id.).

At the close of Cherry Whittington's case, Judge Thomas Flood found that Cherry Whittington was mentally ill or developmentally disabled and not fully able to manage her estate and refused to terminate the conservatorship and restore custody of the minor child to her (Page 176, id.). The court noted that both psychiatrists who treated her found that she was suffering from a mental illness, schizophrenia. The court further found that Cherry Whittington was able to function so long as she continued receiving medication and psychotherapy (Pages 177-8, id.). The court found that both doctors were of the opinion that a subsequent psychotic episode would become likely in the event she failed to continue taking medication (Pages 177-8, id.) The court

relied on an Illinois statute which states that when one parent is dead, the surviving parent is not entitled to custody unless he or she is competent to transact his or her own business. Ill.Rev.Stat., ch.110½, par. 11-7 (1977).

Following the denial of her petitions in February of 1982, Cherry Whittington treated on a weekly basis with Dr. Roubicek until February 8, 1982, when she terminated treatment by failing to appear for an appointment. She began treating with Dr. Sohee Lee, who had treated her earlier while she was at the Zeller Mental Health Center (R. C175, 383-0552). A letter to Dr. Lee from Dr. Roubicek dated April 21, 1982, stated that Cherry Whittington had become openly psychotic in February of 1981 after her second husband, Howard Price, had become aggressive to her during one of his drinking bouts (R. C175, 383-0552). In the same

letter Dr. Roubicek recommended to Dr. Lee that Cherry Whittington would need constant support since she would have a tendency to become confused anytime her second husband became aggressive. Dr. Lee's office notes indicate that Cherry Whittington informed him in July of 1982 that she and her second husband were attending Alcoholics Anonymous. On April 2, 1983, Cherry Whittington terminated treatment with Dr. Lee by canceling an appointment. At the time of terminating treatment with Dr. Lee, Dr. Lee was continuing to prescribe Haldol, an anti-psychotic medication, as was Dr. Roubicek (R. C175-6, 383-0552). Earlier on February 20, 1981 Dr. Lee had told a caseworker at the La Salle County Mental Health Center following Cherry Whittington's re-hospitalization for mental illness that she would need long-term treatment (R. C176, 383-0552).

When Cherry Whittington terminated treatment with Dr. Lee and failed to appear

for a scheduled appointment on April 2, 1983, she instead saw Dr. Werner Teuter on the same date. Dr. Tuteur first saw her once before on June 18, 1978, a little more than a month after she killed Ralph Whittington (R. C174, 383-0552). Although she was confined at the Zeller Mental Health Center when he first saw her, Dr. Tuteur found that she was not suffering from mental illness. His diagnosis was inadequate personality (R. C174, 383-0552). On April 2, 1983 Dr. Tuteur again found that she was not suffering from mental illness (R. C174, 383-0552).

Following her appointment with Dr. Tuteur, Cherry Whittington petitioned the court once again to terminate her conservatorship and the child's guardianship and restore custody of the child to her. But this time she relied on the new notice statute (ch. 110½, par. 11(a)-20(c) and did not give notice of the hearing to the

child's guardian. She appeared ex-parte before a different judge, Judge Hoffman, who terminated the conservatorship (R. C33, 383-0519). Judge Hoffman, without the benefit of cross-examination, relied upon the medical report of Dr. Tuteur and listened to the same witnesses who had testified at the first hearing. Upon learning of the order terminating the conservatorship, the child's guardian moved to vacate the order but her motion was denied (R. C48, 383-0519). A motion to reconsider was similarly denied (R. C48, 383-0519). The child's guardian then appealed.

2. Procedural History: Basis of Federal Jurisdiction.

The Appellate Court of Illinois for the Third District unanimously reversed the order terminating the conservatorship of Cherry Whittington. The Appellate Court observed that the conservatorship of Cherry

Whittington and the guardianship of the minor child were commenced in 1978 and the statute governing notice to restore competency had undergone substantial revision since that time. The earlier notice statute provided that notice was to be given to the representative and to such interested persons as the court directs. Ill. Rev. Stat., ch. 110½, par. 11-14 (1977). Interested person was defined as one who represents a financial interest, property right or fiduciary status at the time of reference, which may be affected by the action, power, or proceeding involved. Ill. Rev. Stat., ch. 110½, par. 1-2.11 (1980). The child's guardian had argued that the prior notice statute in force when the conservatorship was commenced gave the child's guardian a vested right to notice of any hearing to restore competency which could not be taken away by rewriting the statute. The new statute

refers to an incompetent as a ward and says that notice of a hearing to restore competency of a ward is to be given only to the ward and to the guardian of the ward. Ill. Rev.Stat., ch.110½, par. 11(a)-20(c) (1983).

The Appellate Court stated that under current law a ward's guardian is entrusted with custody of the ward's minor children and is directed to make provision for the children's support, care, comfort, health, education and maintenance and to apply the ward's income and estate for the comfort, suitable support and education of the ward's children. Ill.Rev.Stat., ch.110½, par. 11(a)-17(a) and 11(a)-18(a) (1983). The Appellate Court reasoned that if the conservatorship of Cherry Whittington and the guardianship of her minor child had arisen under the new statute, the guardian of Cherry Whittington would also have had the care and custody of her minor child and would have been entitled to notice

on that basis under the new statute. Since Jean Lyons is the child's guardian, she is likewise entitled to notice of the hearing to terminate Cherry Whittington's conservatorship. In her Motion To Reconsider before Judge Hoffman the child's guardian had argued:

> There is nothing in Subsection (c) of Section 11(a)-20 of the Probate Act which suggests that the Court should interpret Subsection (c) so strictly as to limit giving notice of the hearing (to terminate the conservatorship) only to the ward (Cherry Whittington). If the Court feels bound to the letter by the notice provision of Section 11(a)-20 of the Probate Act, then it should declare such provision unconstitutional since the provision deprives the minor and his Guardian of their right to due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Article 1, Section 2 of the Constitution of the State of Illinois. (R. C56, 383-0519, page 7).

Judge Hoffman denied the Motion To Reconsider in a one sentence order (Appendix D). Jean Lyons then made the exact same argument to the Appellate Court

of Illinois. On page 4 of its opinion the Appellate Court stated that it had interpreted the new notice statute 11(a)-20(c) broadly in order to avoid a possible due process violation (Appendix C). The Appellate Court stated that since the adjudication of competency at the first hearing directly affected the outcome of the subsequent proceeding to terminate the guardianship of the child (and restore custody of the child to Cherry Whittington), the trial judge had erred in strictly construing the current notice provision (against the child's guardian).

The Supreme Court of Illinois granted Cherry Whittington leave to appeal and reversed the Appellate Court in respect of terminating the conservatorship but affirmed in respect of allowing the guardian to retain custody of the child. The child's guardian had also argued to the Supreme

Court that the current notice statute deprived the child of due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 2 of the Constitution of the State of Illinois. At page 3 of its opinion the Supreme Court dismissed this argument and stated:

> ...Moreover, since neither Richard nor his guardian has any justiciable interest in the conservatorship of the petitioner's estate, it is difficult to understand the appellate court's concern that failure to give them notice of the hearing to terminate the petitioner's conservatorship might violate due process.

REASONS FOR ALLOWANCE OF WRIT

28 U.S.C. 1257 provides that final judgments rendered by the highest court of a State may be reviewed by the Supreme Court of the United States by writ of certiorari where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

Supreme Court Rule 17.1(c) permits granting review on a writ of certiorari when a state court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court. In this case a State statute recently enacted and no less important than a federal law has been upheld by the Supreme Court of Illinois although it denies due process of law to minor children and is repugnant to the Constitution of the United States and the Constitution of the State of Illinois. This case should be decided by the Supreme Court of the United States since the statute is unconstitutional and affects the custody and well-being of minor children and stands to be upheld in future cases in Illinois with the end result being that a mentally unstable and violent parent will obtain a superior right to custody of a minor child and may kill or injure the child. There is

no other court which can grant relief other than the Supreme Court of the United States.

ARGUMENT

The Supreme Court of Illinois has acknowledged the right and correlative responsibility of a parent to care for his or her child as being a basic human right, fundamental and as ancient as mankind (In re Custody of Townsend, (1981) 86 Ill.2d 502, 427 N.E.2d 1231) This right is expressed by the Illinois General Assembly in paragraph 11-7 of the Probate Act, which provides:

> Parental right to custody. If both parents of a minor are living and are competent to transact their own business and are fit persons, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business (emphasis added) and is a fit person, he is similarly entitled.... (Ill.Rev.Stat. 1983, ch.110½, par.11-7)

In re Custody of Townsend is the leading case involving a custody dispute between a natural parent and a third-party custodian. The Illinois Supreme Court stated therein that "it is an accepted presumption that the right or interest of a natural parent in the care, custody and control of a child is superior to the claim of a third person." The burden is on the third-party to establish good cause or reason to overcome the presumption that the natural parent has the first and superior right to custody of the child.

Paragraph 11-7 clearly states that a parent must be competent to transact his business affairs in order to be entitled to the custody of his child. Paragraph 11-7 clearly bars an incompetent from petitioning for custody. The third-party custodian of a minor child has the right to be present at the hearing to restore

the parent to competency because restoration of competency removes the bar to custody contained in paragraph 11-7 and creates in the parent a superior right to custody pursuant to paragraph 11-7. The superior right doctrine encompassed by paragraph 11-7 is a tremendous advantage to a parent in a custody proceeding involving a third-party custodian. The superior right doctrine shifts the burden of proof from the parent to the third-party custodian. The Illinois Supreme Court in Townsend reaffirmed its previous holding that a third-party seeking to retain custody of a child over the superior right of the natural parent must demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody. The court further held that the fact that a third-party has had custody of the child for a substantial period of time does not rise to the level of a presumption so as to neutralize the superior right doctrine.

The Illinois Supreme Court's application of the new notice statute (Ill. Rev. Stat., 1979, ch. 110½, par. 11(a)-20(c) to prevent a third-party custodian from being present at the hearing to restore the parent to competency is unfair, prejudicial and unconstitutional and denies the third-party custodian due process of law and equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution ard Article 1, Section 2 of the Illinois Constitution. On the one hand the Illinois Supreme Court recognizes a superior right to custody in the natural parent as against a third-party custodian if that natural parent is competent. On the other hand the Illinois Supreme Court does not allow the third-party custodian to be present at the hearing in which the natural parent seeks to be restored to competency and gain the advantage of the superior right to custody which will

defeat the claim of the third-party custodian. The third-party custodian is prohibited from cross-examining witnesses and participating in the judicial determination that the natural parent has in fact been restored to competency and is entitled to the advantage of the superior right to custody. Once a finding of competency by a circuit court has been affirmed by the Illinois Supreme Court, the finding is res judicata and prohibits the issue of competency from being raised in the child's guardianship proceeding. A finding of competency by a circuit court which is affirmed by the Supreme Court but which is flawed will nevertheless carry great weight and be a tremendous influence in the next custody proceeding. Any testimony regarding the mental and emotional fitness of Cherry Whittington will be prohibited or given no consideration since the Illinois Supreme

Court has gone on record as being in agreement with Dr. Tuteur who stated in his report, which is at the foundation of the order terminating the conservatorship, that Cherry Whittington "was not and is not now mentally ill...is in full contact with reality...(and) can handle her estate and body in the normal manner of a prudent person" (R. C174, 383-0552). Since the Illinois Supreme Court has spoken and found that Cherry Whittington is mentally and emotionally fit, it can be assured that the next trial judge of the custody proceeding will have no other choice but to adopt the opinion of Dr. Tuteur as the llinois Supreme Court has and find Cherry Whittington fit. Dr. Tuteur saw Cherry Whittington only twice in five years and was not given all of the facts by her. His opinion that she was never mentally ill is based on incomplete and false information and is incorrect. Cherry

Whittington has been under psychiatric treatment and in and out of mental institutions continuously since the murder in 1978. What is most ironic is that Cherry Whittington rejected Dr. Tuteur's finding in 1978 that she was not mentally ill since this report was of no use in the criminal proceeding in which she sought to be found not guilty by reason of insanity. Dr. Tuteur's report was also rejected at this time since it never would have supported the establishment of the conservatorship. Instead the medical report of Dr. Assalley was used since he found her to be incompetent. The fact that the opinion of Dr. Tuteur has been accepted by the Illinois Supreme Court as the last word on Cherry Whittington's mental and emotional fitness is a travesty and will eliminate the issue of her fitness in any subsequent custody proceeding.

The Illinois Supreme Court on page 4

states that the child's guardian will have the opportunity to cross-examine Cherry Whittington's witnesses regarding her emotional stability. This statement misapprehends the fact that Cherry Whittington will have no need to call any witnesses to testify to her emotional stability since she has been found to be stable based on the report of Dr. Tuteur who found her to be "in full contact with reality" and a "prudent person." Since the Illinois Supreme Court has accepted Dr. Tuteur's opinion as to her fitness and emotional stability, no circuit court will ever reach a contrary finding in a subsequent custody hearing. The Illinois Supreme Court further states at page 4 that the child's guardian will have the opportunity to present evidence regarding Cherry Whittington's stability. Presenting such evidence will be fruitless since Dr. Tuteur has concluded that

Cherry Whittington is emotionally stable and always has been and has never been mentally ill. His opinion along with the other evidence produced at the hearing has been described by the Illinois Supreme Court as fully supporting the circuit court's decision that Cherry Whittington is mentally and emotionally fit. It will be impossible to overcome in a subsequent hearing the weight given Dr. Tuteur's opinion by the Illinois Supreme Court.

By affirming the decision of the circuit court the Illinois Supreme Court allowed the final decision on competency to be made by a psychiatrist and not by a court after cross-examination of the psychiatrist and a full evidentiary hearing. This is the best example of a case that could ever come before any court in regard to the issue of whether a child or its guardian should be present at his mother's competency hearing.

It best exemplifies what can happen in a conservatorship proceeding when a court decision is based on the self-serving testimony of the incompetent parent and a medical report of a psychiatrist without cross-examination by an adverse party. Exactly the same result would have occurred before Judge Flood had the medical reports of Dr. Lee and Dr. Roubicek been allowed into evidence in lieu of subjecting their testimony to cross-examination. Upon conclusion of the hearing there was no doubt that Cherry Whittington continued to be incompetent and in need of a conservatorship. This was apparent to Cherry Whittington who did not take an appeal. Had an appeal been taken and the Illinois Supreme Court asked to rule it would have reversed and ruled that the child's guardian had no right to notice of the hearing since the notice provision (11(a)-20(c)) had already been revised before this first hearing. As a result of a

reversal at that time by the Illinois Supreme Court, the bar of Section 11-7 would have been removed and Cherry Whittington could have obtained custody of her child based on the superior right of a parent doctrine when in reality she was incompetent and had no legal right to even petition for custody. The ultimate decision in a case such as this in which there is very serious mental illness and a propensity for violence should not be made by a psychiatrist but rather by a judge since a decision has such far-reaching consequences. A court has no right to delegate its decision-making authority to a psychiatrist. A psychiatrist's opinion should always be subject to cross-examination in any court proceeding. The cross-examination of Dr. Lee and Dr. Roubicek in the first hearing led to a judge's decision that was contrary to their opinions but based upon the evidence.

The Illinois Supreme Court on page 3 of its opinion states that neither Richard, the minor child, nor his guardian has any justiciable interest in the conservatorship of Cherry Whittington's estate. Richard is the only child of Cherry Whittington and is entitled to support from her and from her conservator pursuant to paragraph 11(a)-18(a). He is also her sole heir outside of her husband. He has a property interest in preserving and protecting her estate for his own current support and for inheritance in the event of her death. If she in fact continues to be incompetent, he has a property interest in requesting intervention of the court to protect her estate from being wasted to his and her detriment. He also has a liberty interest in protecting his body and preventing his death, injury or abuse by his mother because she is in need of mental treatment.

The Appellate Court for the Third District noted at page 4 of its opinion, "...the adjudication of competency at the first hearing (on termination of the conservatorship) directly affected the outcome of the subsequent proceeding to (decide custody and) terminate the guardianship of the child,..." The adjudication of competency removed the bar of paragraph 11-7 which had prevented Cherry Whittington from petitioning for custody. Richard and his guardian have a liberty interest in preventing Cherry Whittington from petitioning for custody based upon the superior right of a parent while in fact being incompetent.

On page 3 of its opinion the Illinois Supreme Court expresses difficulty in understanding the appellate court's concern that failure to give Richard and his guardian notice of the conservatorship hearing might violate due process. The

revision of the notice provision has had an effect on the rights of Richard and his guardian similar to that of an ex post facto law. Prior to the revision of the notice provision Richard and his guardian clearly had a vested right to notice of the hearing as interested persons since state law defined interested person as one whose status would be affected by the proceeding involved (Ill.Rev.Stat. 1981, ch.110½, par. 1-2.11). Following the revision of the notice provision, if one read no further than the notice provision itself, it would appear that the right to be present at the hearing had been taken away from Richard and his guardian. The appellate court read further and determined that other sections of the statute on disabled adults (paragraphs 11(a)-17 and 11(a)-18) could be interpreted broadly so as to provide for the presence of Richard and his guardian at the hearing

since it was still true that the outcome of the hearing on termination of the conservatorship would give Cherry Whittington the right to petition for custody pursuant to Section 11-7. The appellate court took this approach in order to avoid having to declare the notice statute unconstitutional on due process grounds. Standing alone the revision of the notice statute clearly altered the rights of Richard and his guardian to their disadvantage. The appellate court recognized the dramatic effect that the presence of Richard's guardian at the hearing before Judge Flood had had on the outcome of the hearing. Richard's guardian had refused to stipulate to the admission of a psychiatric report of Dr. Roubicek, a psychiatrist which recommended termination of the conservatorship (Page 2, Transcript of Proceedings, July 8, 1983). The report failed to inform the court that Dr. Roubicek at

that moment was treating Cherry Whittington on a weekly basis with psychotherapy and medication. This was brought out on cross-examination (Pages 77, 78, 82, 97, id). Dr. Roubicek further testified under cross-examination that he had diagnosed her as schizophrenic and that she would become psychotic if she ceased taking medication (Pages 90, 94, id.) Cherry Whittington admitted under cross-examination that she stopped taking medication after she left the Zeller Mental Health Center in 1979 because she thought she did not need medication anymore (Page 145, id.). She admitted to hospitalization for mental treatment in 1981 and that she now felt better taking medication (Pages 147, 148, id.).

The notice statute was revised in 1979 but Cherry Chittington did not rely upon it in the hearing before Judge Flood in 1982 choosing instead to consolidate her petitions to terminate the conservatorship and

guardianship. Although Judge Flood made the right decision and the only decision he could have made since the evidence was so clearly against terminating the conservatorship, the new notice statute as interpreted by the Illinois Supreme Court would have prevented a just ruling from ever having been made had Cherry Whittington opted not to give notice to the child and his guardian instead of consolidating her petitions. The new notice provision not only denies the child and his guardian due process of law under the Fourteenth Amendment of the United States Constitution and under Article 1, Section 2 of the Illinois Constitution, it also denies the minor child and his guardian

equal protection under the law because the child and his guardian are being treated differently than other individuals who are afforded an opportunity to be present at a hearing which affects their status.

The decision of the Illinois Supreme Court should be reversed and this cause should be remanded for a new hearing on the termination of the conservatorship in the presence of the child's guardian. Dr. Tuteur can be cross-examined and confronted with the following facts which were not given to him by Cherry Whittington:

a. Cherry Whittington was a patient at Zeller Mental Health Center from December of 1978 until November of 1979 (R. C171-2, 383-0552);

b. She was admitted to the Community Hospital of Ottawa

for psychiatric treatment in February of 1981 and received treatment at the La Salle County Mental Health Center in March of 1981 (R. C172-5, 383-0052);

c. She treated with Dr. Roubicek, a psychiatrist, for about a year with medication and psychotherapy after her hospital confinement (R. C172-5, 383-0552);

d. She treated with Dr. Lee, a psychiatrist, with medication and psychotherapy after treating with Dr. Roubicek, all the way up to the hearing on the termination of her conservatorship which is being reviewed by this court (R. C175, 383-0552);

e. Her husband is an alcoholic and

beats her (R. C175, 383-0552);

f. She herself was attending Alcoholic's Anonymous while treating with Dr. Lee (R. C175-6, 383-0552);

g. She had been diagnosed a schizophrenic by Dr. Ravlin, Dr. Roubicek and Dr. Lee (Pages 39, 40, 77, 90, Transcript of Proceedings of February 3, 1982, R. C229, 383-0552).

At the hearing Cherry Whittington can be cross-examined and the court can be allowed to determine from the evidence adduced under cross-examination if in fact Cherry Whittington is competent. A new hearing would also allow the child's guardian to determine if Cherry Whittington has been hospitalized or treated for any mental disorders since the last hearing in 1983. Cherry Whittington should be made to properly prove her entitlement to

use of the superior right doctrine in the upcoming custody proceeding. The superior right to custody should not be given to her by illegally excluding the child's legal guardian from the hearing on termination of the conservatorship.

CONCLUSION

For the reasons stated in this writ, the petition should be granted.

Respectfully submitted,

KENNETH A. KOZEL
PETZ & KOZEL

Counsel for the
Petitioner

APPENDIX A

IN THE SUPREME COURT OF ILLINOIS

Docket No. 60506

Agenda 23-March 1985.

In re ESTATE OF CHERRY WHITTINGTON, An Incompetent, et al. (Jean Lyons, Guardian, Appellee, v. Daniel Bute, Conservator, et al., Appellants).

JUSTICE SIMON delivered the opinion of the court:

On May 2, 1978, the petitioner, Cherry Whittington, killed her husband. After trial on charges of murder and manslaughter, she was found not guilty by reason of insanity. She was committed to the Zeller Mental Health Center in December 1978, where she remained until November 1979, when she was released to the care of a halfway house in Peoria. Daniel Bute was appointed conservator of the petitioner's estate in 1978 when she was judged incompetent. At the time of the killing, the petitioner's two-month-old

son, Richard Whittington, was placed with his great aunt, Jean Lyons, the respondent in this case. Lyons was later appointed Richard's guardian, and the child has lived with her ever since.

In 1981, the petitioner married Howard Price. Soon after, she filed a petition in the circuit court of La Salle County to terminate the conservatorship of her estate and the guardianship of her son and to have the child returned to her custody. The circuit court denied the petition on February 5, 1982. A new judge was assigned to the conservatorship in March 1983, and the petitioner then filed a series of petitions for termination of both the conservatorship and the guardianship, none of which were ruled upon. On May 24, 1983, Daniel Bute filed a petition to terminate the conservatorship, but did not give notice to the respondent. After a hear-

ing on Bute's petition on June 3, 1983, at which the petitioner, Howard Price, Bute, and a neighbor of the Prices testified and a letter from a psychiatrist who had examined the petitioner was submitted, the judge ordered the conservatorship terminated. Upon learning of the order, the respondent filed a motion to vacate and another to reconsider the order, both of which were denied.

On July 1, 1983, the petitioner filed a petition to terminate Richard's guardianship and return him to her custody. The respondent filed a motion to dismiss, and the petitioner moved for summary judgment. On August 22, 1983, the judge denied the respondent's motion for dismissal and granted the petitioner's motion for summary judgment, which resulted in an order terminating Richard's guardianship and restoring custody to the

petitioner. However, execution of the custody order was stayed pending appeal of both of the orders-that terminating the conservatorship as well as that terminating the guardianship. The appellate court reversed both orders. (124 Ill. App.3d 198.) Leave to appeal to this court was granted under our Rule 315 (87 Ill.2d R. 315).

Two issues are presented in this appeal: first, whether the legal guardian of a minor child has the right to be given notice of and to be present at a hearing on a petition to terminate the conservatorship of the child's mother's estate; and second, whether it was proper to grant summary judgment on the petition to terminate Richard's guardianship and change his physical custody. Our answer to both inquiries is in the negative.

TERMINATION OF THE CONSERVATORSHIP OF PETITIONER'S ESTATE

The petitioner appeals from the decision of the appellate court reversing the circuit court's order terminating the conservatorship of her estate. The respondent successfully argued to the appellate court that she was entitled to notice of the hearing on the conservatorship. The petitioner argues that under the statute applicable at the time of the hearing, section 11a-20(c) of the Probate Act of 1975 as amended (Ill.Rev.Stat.1981,ch. 110½, par. 11a-20(c)), the respondent was not entitled to notice. That statute provides:

> "(c) Notice of the hearing on a petition under this Section, together with a copy of the petition, shall be given to the ward, unless he is the petitioner, and to the guardian, not less than 14 days before the hearing."

The guardian referred to in section 11a-20(c) was Daniel Bute, referred to above

as the conservator. He gave notice of the hearing and a copy of the petition to Cherry Whittington, the ward, and the only person to whom the statute required notice be given under these circumstances. Thus the statutory requirements were met.

The respondent argued to the appellate court that, under the notice provision in effect in 1978 when the conservatorship was established, she was entitled to notice as an "interested person." At that time, the statute provided:

> "(b) Notice of the hearing on any petition to be adjudged competent and for revocation of letters of office **shall be given to the representative** and to such other interested persons as the court directs***." (Ill.Rev. Stat. 1977, ch.110½,par. 11-14(b).)

The appellate court noted that this section was not in effect at the time the question of notice was pertinent; when the petition was filed and the hearing held, this section had been replaced by

section 11a-20(c), quoted above, which required notice to no one but the petitioner in this case.

However, the appellate court decided that if the hearing to terminate the conservatorship had occurred under the present statute, the petitioner's conservator would also have had the care and custody of Richard, and would therefore have been entitled to notice. This is, however, an erroneous statement of the law. Section 11a-17 (Ill.Rev.Stat.1981, ch. 110½,par. 11a-17) describes the duties of the guardian of a person; section 11a-18 (Ill.Rev.Stat.1981,ch. 110½, par. 11a-18) describes the duties of the guardian of an estate, sometimes referred to herein as a conservator. Nothing in this statute warrants the assumption that the guardian of an incompetent's estate must also be the guardian of the incompetent's

person, much less the guardian of the incompetent's minor children. Moreover, in this case, the conservator of the petitioner's estate was not Richard's guardian; the respondent was. Thus, the appellate court erred in assuming that the respondent would be entitled to notice under the present statute.

The appellate court also stated that the question of terminating the conservatorship had been consolidated with that of terminating Richard's guardianship, and that "these matters belonged together." While it is true that the petitioner had filed a consolidated petition in March 1983, the petition actually considered by the circuit court was Bute's petition to terminate the conservatorship only. The termination of the conservatorship and guardianship could have been considered together, as they were at the 1981

hearing, if the circuit court had consolidated the matters. However, it was certainly not necessary for the circuit court to do this because they present different questions. Moreover, since neither Richard nor his guardian has an justiciable interest in the conservatorship of the petitioner's estate, it is difficult to understand the appellate court's concern that failure to give them notice of the hearing to terminate the petitioner's conservatorship might violate due process.

The respondent next argues that she was entitled to notice of the hearing to terminate the conservatorship because the outcome of that hearing directly affected the proceeding to terminate Richard's guardianship. While it would almost certainly be fruitless for an adjudged incompetent to file a petition for restoration of custody of a minor child, whether the petition were filed under the Probate Act

of 1975 or the Illinois Marriage and Dissolution of Marriage Act, restoration of the petitioner's competence could hardly determine the outcome of a custody hearing at which the petitioner's fitness to have custody would still be at issue, and the respondent would have the opportunity to present evidence and cross-examine the petitioner's witnesses regarding the petitioner's emotional stability. Moreover, even if this argument were valid, the fact would remain that the respondent had no justiciable interest in the conservatorship of the petitioner's estate, and no statutory right to notice of a hearing to terminate the conservatorship.

Because we so hold, we need not address the petitioner's additional argument that the hearing given the respondent by the circuit court on her objections to the termination of the conserva-

torship cured any defect that might have resulted from lack of notice to the respondent. We need only add that the hearing conducted by the circuit court appears to have been adequate, and that the decision was fully supported by the evidence in the record. We therefore affirm the circuit court's order terminating the petitioner's conservatorship.

TERMINATION OF RICHARD'S GUARDIANSHIP AND RESTORATION OF PETITIONER'S CUSTODY

With respect to the petition to terminate Richard's guardianship and return him to the petitioner's custody, the respondent argues initially that the circuit court erred in denying her motion to dismiss the petition. The respondent's motion was based on section 610 of the Illinois Marriage and Dissolution of Marriage Act (Ill.Rev.Stat.1981, ch. 40,par.610), which provides:

"(a) No motion to modify a cus-

tody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.

(b) The court shall not modify a prior custody judgment unless it finds, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior judgment unless:

(1)the custodian agrees to the modification;

(2) the child has been integrated into the family of the petitioner with consent of the custodian; or

(3)the child's present environment endangers seriously his physical, mental, moral or emotional health and the harm likely to be caused by a change of environment is outweighed by its advantages to him."

The respondent argues that nothing was alleged by the petitioner that had not been presented at a hearing on her ear-

lier petition, which had been ruled on only 14 months before, and that section 610 therefore required that respondent's motion to dismiss be granted.

However, this case does not involve a custody dispute incident to a marriage or dissolution of a marriage; it involves a custody arrangement established under the Probate Act of 1975. Moreover, the respondent failed to show how any of the purposes of the Illinois Marriage and Dissolution of Marriage Act set out in section 102 (Ill.Rev.Stat. 1981, ch.40,par. 102) apply to this case. Because the provisions on which the respondent relies do not apply to the facts of this case, we conclude that the trial court properly denied the respondent's motion to dismiss.

The petitioner argues that the appellate court erred in reversing the circuit court's order allowing summary judgment in

her favor. Summary judgment is appropriate only when the pleadings, depositions, admissions on file, and affidavits present no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. (Ill.Rev.Stat. 1981, ch. 110, par.2-1005(c).) In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings, depositions, admissions and affidavits strictly against the movant and liberally in favor of the opponent. (Kolakowski v. Voris (1980), 83 Ill. 2d 388, 398.) We agree with the appellate court that summary judgment should not have been granted in this case.

In In re Custody of Townsend (1981), 86 Ill.2d 502, this court noted:

> "In child-custody disputes it is an accepted presumption that the right or interest of a natural parent in the care, custody and control of a child is superior to the claim of a third person. The presumption is not

> absolute and serves only as one of several factors used by courts in resolving the ultimately controlling question of where the best interests of the child lie. (Citations.) A court need not find that the natural parent is unfit or has forfeited his custodial rights before awarding custody to another person if the best interests of the child will be served. (Citations.) This standard or 'guiding star' (citation) is a simple one designed to accomodate the often complex and unique circumstances of a particular case." (86 Ill.2d 502, 508.)

In People ex rel. Edwards v Livingston (1969), 42 Ill.2d 201, this court recognized that under the predecessor of section 11-7 of the Probate Act of 1975 (Ill. Rev.Stat.1981, ch. 110½, par. 11-7) the superior-right doctrine operates within the context of the best-interests standard.

The paramount standard, then, for determining a custody dispute under the applicable statute and case law is the best interest of the child. In determining the best interest of the child a court must consider all relevant factors. Sec-

tion 602 of the Illinois Marriage and Dissolution of Marriage Act (Ill.Rev.Stat. 1981, ch. 40, par. 602) enumerates a useful reference list of relevant factors. Of obvious importance in the present case is the capacity of the parties to care for a child appropriately; the length of time Richard has been in the respondent's custody; his adjustment to home, school, and community; the mental and physical health of all the parties involved; and the potential for physical violence and alcohol abuse in the homes in which he might be placed.

Clearly, a custody decision in a case such as this requires a careful determination of the relevant facts and a sensitive weighing of a series of factors. A summary judgment proceeding is ill suited to such a determination. In this case, moreover, issues of material fact were raised

by the affidavits and pleadings, including the petitioner's emotional stability, her husband's sobriety, the respondent's emotional stability, and the economic motivation of the parties in seeking Richard's custody in view of a modest sum he received from an insurance policy on his father's life. These are of crucial importance in making a custody decision. These facts, as well as the effect of removing seven-year-old Richard from the home in which he has been cared for since he was two months old, can only be established and weighed at a hearing on the merits at which both parties are free to present evidence and to cross-examine each other's witnesses.

The judgment of the appellate court reversing the termination of the conservatorship is reversed; its judgment reversing the entry of summary judgment on

the issue of the guardianship is affirmed. The judgment of the circuit court terminating the conservatorship is affirmed; its entry of summary judgment on the issue of the guardianship is reversed, and the cause is remanded to the circuit court for proceedings consistent with this opinion.

Appellate court affirmed in part and reversed in part; circuit court affirmed in part and reversed in part; cause remanded.

APPENDIX B

No. 60506 - In the Matter of the Estate of Cherry Whittington, etc., et al. (Jean Lyons, Guardian, etc., appellee, v. Daniel Bute, etc., et al., appellants). Appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 7, 1985.

Enclosed please find a new page to the opinion.

1977,ch.110½,par. 11-14(b).).

The appellate court noted that this section was not in effect at the time the question of notice was pertinent; when the petition was filed and the hearing held, this section had been replaced by section 11a-20(c), quoted above, which required notice to no one but the petitioner in this case.

However, the appellate court decided that if the guardianship and conservatorship had been established under the present statute, the petitioner's conservator would also have had the care and custody of Richard, and would therefore have been entitled to notice. This is, however, an erroneous statement of the law. Section 11a-17(Ill.Rev.Stat.1981, ch. 110½,par. 11a-17) describes the duties of the guardian of a person; section 11a-18 (Ill.Rev.Stat.1981, ch.110½, par.11a-18) describes the duties of the guardian of

an estate, sometimes referred to here as a conservator. Nothing in this statute warrants the assumption that the guardian of an incompetent's person, much less the guardian of the incompetent's minor children. Moreover, in this case, the conservator of the petitioner's estate was not Richard's guardian; the respondent was. Thus, the appellate court erred in assuming that the respondent would be entitled to notice under the present statute.

The appellate court also stated that the question of terminating the conservatorship had been consolidated with that of terminating Richard's guardianship, and that "these matters belonged together." While it is true that the petitioner had filed a consolidated petition in March 1983, the petition actually considered by the circuit court was Bute's petition to

terminate the conservatorship only. The termination of the conservatorship and guardianship could have been considered together, as they were at the 1981 hearing, if the circuit court had consolidated the matters. However, it was certainly not necessary for the circuit court to do this because they present different questions. Moreover, since neither Richard nor his guardian has any justiciable interest in the conservatorship of the petitioner's estate, it is difficult to understand the appellate court's concern that failure to give them notice of the hearing to terminate the petitioner's conservatorship might violate due process.

The respondent next argues that she was entitled to notice of the hearing to terminate the conservatorship because the outcome of that hearing directly affected the proceeding to terminate

Richard's guardianship. While it would almost

APPENDIX C

Case No. 3-83-0519

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1984

IN THE MATTER OF THE ESTATE OF CHERRY WHITTINGTON, AN INCOMPETENT.	)	
IN THE MATTER OF THE ESTATE OF RICHARD RAYMOND WHITTINGTON, A MINOR.	)	Appeal from the Circuit Court of the Thirteenth Judicial Circuit, La-Salle County, Illinois.
JEAN LYONS, GUARDIAN OF THE PERSON AND ESTATE OF RICHARD RAYMOND WHITTINGTON, A MINOR,	)	
RESPONDENT-APPELLANT,	)	
vs.	)	
DANIEL BUTE, CONSERVATOR OF THE ESTATE OF CHERRY WHITTINGTON, AN INCOMPETENT AND CHERRY WHITTINGTON A K A CHERRY WHITTINGTON PRICE,	)	Honorable Leonard Hoffman Presiding Judge
PETITIONERS-APPELLEES.	)	

Mr. JUSTICE STOUDER delivered the opinion of the court:

This appeal arises as a result of a conservatorship and guardianship both of which were established after Cherry Whittington shot and killed her husband, on May 2, 1978. In December of 1978 Cherry Whittington was found not guilty by reason of insanity and was sent to the Zeller Mental Health Center. At the time of the shooting Richard Whittington, Cherry's only child, was two months old and he immediately went to live with his great aunt, Jean Lyons who was later appointed his guardian. Daniel Bute was appointed the conservator of Cherry Whittington and of her estate.

In November of 1979, Cherry was released from Zeller and immediately was admitted to Monroe House a halfway house

in Peoria for treatment. In 1981, Cherry married Howard Price who had employed her as a housekeeper. Soon after her marriage she filed a petition in the Circuit Court of LaSalle County to have her conservatorship terminated and the guardianship of her minor child Richard terminated and his custody restored to her. The trial judge denied her petition.

On March 8, 1983 a new judge was assigned to the conservatorship case. On March 18, 1983, Cherry again filed a petition for termination of the guardianship of Richard and her conservatorship. Three days later Cherry filed an identical petition together with a letter asking that the guardianship and conservatorship matters be consolidated. On May 9, 1983, Cherry filed another petition to terminate the guardianship and to have Daniel Bute discharged and her conservatorship

terminated. On May 24, 1983 a fourth petition was filed this time by Daniel Bute. This petition was only a petition to terminate the conservatorship and Cherry was the only person notified of the hearing set for June 3, 1983. Cherry, her husband Howard Price, Daniel Bute and a neighbor of the Prices appeared on June 3rd. The conservator submitted a letter from a psychiatrist who had examined Cherry only twice once in 1978 shortly after the shooting and once in April of 1983. Based primarily upon the self-serving statements of these parties the Judge ordered the conservatorship terminated. On August 1, 1983, Jean Lyons, Richard's guardian, filed a motion to reconsider which was denied.

On July 1, 1983, Cherry filed a petition to terminate the guardianship and restore custody. Jean Lyons then filed

a motion to dismiss and Cherry filed a motion for summary judgment. On August 22, 1983 the trial judge denied Lyon's motion to dismiss and granted Cherry's motion for summary judgment. The Judge, however, stayed execution of the judgment which restored custody to Cherry Whittington Price pending the outcome of this appeal. The order granting termination of the conservatorship of Cherry Whittington, the order granting motion for summary judgment terminating the guardianship of Richard Whittington and restoring custody to Cherry Whittington Price and the order staying from execution are all being appealed and are all consolidated in this appeal.

The appellant, Jean Lyons, Guardian, raises as the first allegation of error the failure of the trial court to notify her of the hearing at which the conserva-

torship of Cherry Whittington was terminated and she was declared to be competent. The appellee argues that the statutory provisions for notice were fully complied with. Since the guardianship and conservatorship commenced in 1978 the statute has undergone substantial revision. The provision governing notice in a proceeding to restore competency in effect in 1978 was Section 11-14 of Article XI of the Probate Act of 1975. (Ill.Rev. Stat. 1977, ch. 110½, par. 11-14) Subparagraph (6) provided as follows:

> "(6) Notice of the hearing on any petition to be adjudged competent or for revocation of letters of office shall be given to the representative and to such other interested person as the court directs***"

We agree with the appellee that this section is no longer in effect, but we do not find this factor alone determinative of the notice issue. The new Section 11a-20 (Ill.Rev.Stat. 1983, ch. 110½,

par. 11a-20) does indeed provide that

> "(c) Notice of the hearing on a petition under this section,*** shall be given to the ward, unless he is the petitioner, and to the guardian***"

However, where the present statute describes the duties of the guardian of the person under Section 11a-17 and of his estate, Section 11a-18, the statute specifically states that the guardian "shall have custody of the ward and his minor and adult dependent children, shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance" (Ill.Rev.Stat. 1981, ch. 110½, par. 11a-17(a)) and "shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children***" (Ill.Rev.Stat. 1983, ch. 110½, par. 11a-18(a)). Therefore, if the

conservatorship and guardianship had arisen under the present statute the guardian of Cherry Whittington would also have had the care and custody of her minor child, Richard, and would have been entitled to notice under the statute.

Furthermore, the termination of the conservatorship and the termination of the guardianship of Richard had been consolidated. In fact Cherry Whittington's attorney had asked that the two matters be heard together and by the same judge. We agree that these matters belonged together. The initial petition filed in March of 1983 was a consolidated petition and certainly under those circumstances Jean Lyons as guardian of Richard Whittington would have been entitled to notice. Also by interpreting the notice provision of Section 11a-20 broadly we avoid a possible due process violation.

Because the adjudication of competancy at the first hearing directly affected the outcome of the subsequent proceeding to terminate the guardianship of the child, we find that the trial judge erred in strictly construing the notice provision of Section 11a-20.

We note further that the Judge considered and ruled upon Jean Lyons motion for reconsideration of the termination of the conservatorship even though he found that she was not a proper party to the proceeding. This action on the part of the trial court was clearly inconsistent with the court's interpretation of the notice provision of the statute. We, therefore, find that Jean Lyons, guardian of Richard Whittington, was entitled to notice of the hearing for termination of Cherry Whittington's conservatorship and would have received notice had the con-

servatorship arisen under the present statute.

The appellant, Jean Lyons, has also appealed from the decision to terminate the guardianship of Richard Whittington. We agree with appellant that the trial court should not have granted the appellee's motion for summary judgment. Summary judgment will not be granted when there is a genuine issue of material fact. In this case even the appellee's affidavits were contradictory. Cherry Whittington stated that she had not had therapy nor had she taken medication "for a long time." While the affidavit of Dr. Lee states that he saw her early in 1983 and prescribed medication for her at that time. Furthermore, in Lyon's affidavit she stated that Howard Price, Cherry's husband had had a drinking problem for 25 years and attached exhibits from medi-

cal records which indicate that Cherry feared Howard's drinking bouts. This hardly suggests that the Price's portrayal of domestic euphoria was exactly as they had averred.

On several occasions during this proceeding the judge referred to what he called a presumption that a parent has first call upon the custody of a child. The Illinois Supreme Court however has frequently stated the standard in Illinois in custody matters as the "best interest of the child" standard. Fitness of the parent is only one element to be considered in determining what is in a child's best interest. In this case the only evidence before the court had to do with Cherry's fitness. There was no evidence suggesting that Richard was anything but healthy, well adjusted and happy living with Jean Lyons. The fact

Richard had never known another home and Cherry was for all practical purposes a stranger to him.

In People ex. rel. Edwards v. Livingston (1969), 42 Ill.2d 201,247 N.E. 2d 417, the Illinois Supreme Court awarded custody to a young boy's grandfather in a similar situation. The court considered along with other testimony the testimony of a child psychiatrist and determined that considering all of the circumstances "it was not conducive to the child's best interest to remove him from a stable and adequately wholesome environment for the apparently primary purpose of placing him with his natural father who was for all practical purposes a stranger." 42 Ill. 2d at 211. We do not find that the circuit court applied the correct standard in awarding custody to Cherry Whittington because the trial judge considered only

evidence as to the fitness of the natural mother and not evidence of what was in the best interest of the child. We commend the trial judge for granting stay of execution so that this case could be properly reviewed.

We, therefore, reverse both decisions of the Circuit Court of LaSalle County and remand this case for proceedings consistent with our opinion in this matter.

Reversed and remanded.

SCOTT and HEIPLE, JJ., concur.

APPENDIX D

IN THE CIRCUIT COURT OF LASALLE COUNTY, ILLINOIS
PROBATE DIVISION

In Re Estate of	)	
Cherry Whittington, an	)	NO. 78 P 264
Incompetent	)	O R D E R

Hearing on Motion of Jean Lyons, Guardian to Vacate order of June 3rd, 1983, discharging Conservator and Terminating Conservatorship. Counsel for Jean Lyons and Cherry Whittington Price appear. Arguments heard. Court having considered all matters finds that said Motion should be and is hereby denied. So ordered

DATED 7/8/83

L. Hoffman
Judge

APPENDIX E

IN THE CIRCUIT COURT OF LA SALLE COUNTY,
ILLINOIS
PROBATE DIVISION

Re Estate of Whittington) NO. 78-P-364

O R D E R

Lyons mot to reconsider, filed 8/1/83,

denied.

ENTER 8/5/83

L. Hoffman
JUDGE

APPENDIX F

CHAPTER 110½, Paragraph 1-2.11, Ill. Rev.Stat. (1980)

"Interested person" in relation to any particular action, power or proceeding under this Act means one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative. When any provision of this Act requires notice of accounting to or action by an interested person, if a trustee of a trust is an interested person, no notice or accounting to or action by a beneficiary of the trust who is not an heir or legatee is required. When

a ward would be an interested person but a personal fiduciary is then acting for him pursuant to Section 28-3, the personal fiduciary is the interested person instead of the ward, but any notice required to be given to the ward under this Act shall be given to both the personal fiduciary and the ward. This definition also applies to the following terms: "interested party", "person (or party) interested" and "person (or party) in interest".

APPENDIX G

CHAPTER 110½, Paragraph 11-7, Ill.Rev. Stat. (1977)

If both parents of a minor are living and are competent to transact their own business and are fit persons, they are entitled to the custody of the person of the minor and the direction of his education. If

one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person.

APPENDIX H

CHAPTER 110½, Paragraph 11-14(b), Ill.Rev. Stat. (1977)

Notice of the hearing on any petition to be adjudged competent and for revocation of letters of office shall be given to the representative and to such other interested persons as the court directs not less than 20 days before the hearing. If the ward is a veteran or dependent of a veteran on whose account benefit of compensation, adjusted compensation, pen-

sion, insurance or other benefits are payable by the United States, notice shall also be given to the Veterans' Administration Regional Office not less than 20 days before the hearing.

APPENDIX I

CHAPTER 110½, Paragraph 11a-17(a), Ill.Rev. Stat. (1981)

Duties of personal guardian. (a) To the extent ordered by the court and under the direction of the court, the guardian of the person shall have custody of the ward and his minor and adult dependent children; shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance and such professional services as are appropriate but the ward's spouse may not be deprived of the custody and education of the ward's minor and

adult dependent children, without the consent of the spouse, unless the court finds that the spouse is not a fit and competent person to have such custody and education. The guardian will assist the ward in the development of maximum self-reliance and independence. The guardian of the person may petition the court for an order directing the guardian of the estate to pay an amount periodically for the provision of the services specified by the court order. If the ward's estate is insufficient to provide for education and the guardian of his person fails to provide education, the court may award the custody of the ward to some other person for the purpose of providing education. If the person makes a settlement upon or provision for the support or

education of a ward, the court may make such order for the visitation of the ward by the person making the settlement or provision as the court deems proper.

APPENDIX J

CHAPTER 110½, Paragraph 11a-18(a), Ill. Rev. Stat. (1981)

Duties of the estate guardian.

(a) To the extent specified in the order establishing the guardianship, the guardian of the estate shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children, and persons related by blood or marriage who are dependent upon or

entitled to support from him, or for any other purpose which the court deems to be for the best interests of the ward, and the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interests. The guardian may make disbursement of his ward's funds and estate directly to the ward or other distributee or in such other manner and in such amounts as the court directs. If the estate of a ward is derived in whole or in part from payments of compensation, adjusted compensation, pension, insurance or other similar benefits made directly to the estate by the Veterans Administration, notice of the application for leave to invest or expend the ward's funds or estate, together with a copy

of the petition and proposed order, shall be given to the Veterans' Administration Regional Office in this State at least 7 days before the hearing on the application.

APPENDIX K

CHAPTER 110½, Section 11a-20(c), Ill. Rev.Stat. (1979)

Notice of the hearing on a petition under this Section, together with a copy of the petition, shall be given to the ward, unless he is the petitioner, and to the guardian, not less than 14 days before the hearing.

APPENDIX L

Fourteenth Amendment to the Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX M

Article 1, Section 2 of the Constitution of the State of Illinois

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.